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IN THE

Supreme Court of the United States

October Term, 1963

No. 314

TRANS-LUX DISTRIBUTING CORP.,
Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

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LEONARD H. DICKSTEIN,
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of Counsel.

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IN THE

Supreme Court of the United States

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No.

TRANS-LUX DISTRIBUTING CORP.,

Appellant,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

Appellant, Trans-Lux Distributing Corp., appeals from an order of the Court of Appeals of the State of New York, entered on March 26, 1964 and amended pursuant to an order entered on April 30, 1964, reversing a judgment of the Appellate Division, Third Department, Supreme Court of the State of New York and reinstating a determination of the Board of Regents of the University of the State of New York which denied a license for the exhibition of the Danish motion picture, "A Stranger Knocks," in the State of New York and from the judgment of the Supreme Court of the State of New York, Albany County, entered on that order on April 24, 1964.

A. Opinions Below.

The opinions in the New York Court of Appeals (Appendix A, *infra*) are reported at 14 N. Y. 2d 88, 198 N. E. 2d 242, 248 N. Y. S. 2d 857 (1964).

The opinions in the Appellate Division (Appendix B, *infra*) are reported at 19 A. D. 2d 937, 244 N. Y. S. 2d 333 (1963).

The determination of the Board of Regents (Appendix C, *infra*) has not been officially reported.

B. Jurisdiction.

Appellant instituted this proceeding in the New York Supreme Court, Albany County, seeking judgment (1) annulling the determination of the State Board of Regents which denied a license for exhibition of the motion picture, "A Stranger Knocks", in the State of New York; and (3) declaring unconstitutional the State licensing statute and related provisions which require a license for exhibition of a motion picture and impose criminal sanctions for exhibition without a license (R. 6-10).*

The proceeding was instituted under Article 78 of the New York Civil Practice Act, then governing proceedings seeking review of determination by State administrative officials. In accordance with New York practice, the proceeding was transferred for disposition to the Appellate Division, Third Department, of the State Supreme Court (R. 2-3). The Appellate Division entered an order annulling the determination of the Board of Regents and directing that a license for exhibition of the motion picture issue forthwith (R. 83-85).

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* References to the printed Record on Appeal in the Court of Appeals are cited R. ____. References to the appendix to appellant's brief in the Court of Appeals are cited Br. App. ____.

The Board of Regents thereupon appealed to the New York Court of Appeals, which, on March 26, 1964, entered an order reversing the order of the Appellate Division and reinstating the determination of the Board (Appendix D, *infra*). That order was subsequently amended pursuant to order entered on April 30, 1964 (Appendix E, *infra*). The final order and judgment of the State Supreme Court, Albany County, was entered on April 24, 1964 (Appendix F, *infra*).

The notice of appeal to this Court was filed in the State Supreme Court, Albany County, on June 5, 1964.

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. § 1257(2). *Jacobellis* v. *Ohio*, — U. S. —, 32 L. W. 4652; *A Quantity of Copies of Books* v. *Kansas*, — U. S. —, 32 L. W. 4658; *Freedman* v. *Maryland*, — U. S. —, 32 L. W. 3444; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684 (1959); *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (1954); *Superior Films* v. *Dept. of Education*, 346 U. S. 587 (1954); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *Roth* v. *United States* (*Alberts* v. *California*), 354 U. S. 476 (1957); *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957); *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962); *Butler* v. *Michigan*, 352 U. S. 280 (1957); *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956); *Head* v. *New Mexico*, 374 U. S. 424 (1963).

C. Statutes Involved.

Section 122 of the Education Law of the State of New York, McKinney's New York Laws, 1953, Education Law, § 122, provides, as follows:

> "§ 122. Licenses
>
> The director of the division [the Motion Picture Division of the State Education Department] or,

> when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto."

Related provisions of the Education Law of the State of New York, McKinney's New York Laws, 1953, Education Law, Art. 3, Part II, §§ 120-132, and section 305 of the Tariff Act of 1930, 46 Stat. 688, 19 U. S. C. 1305, are set forth in Appendix G, *infra*.

D. Questions Presented

Section 122 of the New York Education Law, which governs the issuance of licenses for exhibition of motion pictures in the State, has here been construed and applied to authorize denial of a license to a film (not held to be obscene within the meaning of this Court's decisions and in fact not so obscene) on the ground that parts of the film, that is, two of its scenes are "obscene" solely because they portray conduct which if actually engaged in in public would violate State statute or public policy.

1. The question presented is whether, as so construed and applied, section 122 of the New York Education Law violates the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth.

2. A further question presented is whether section 122 of the Education Law and related New York statutes, which provide for issuance of a license before a film may be

exhibited in the State and impose criminal sanctions for exhibition without a license, on their face and as here construed and applied, constitute an impermissible prior restraint on freedom of expression in violation of the First Amendment, as incorporated in the Fourteenth.

3. A further question presented is whether section 122 of the Education Law, as here construed to authorize denial of licenses for exhibition of imported films on the ground of obscenity and here applied to authorize denial of a license for an imported film previously admitted for entry by the United States Bureau of Customs after determination that it is not obscene, conflicts with section 305 of the Tariff Act of 1930, 19 U. S. C. 1305, and violates Article VI of the United States Constitution.

E. Statement of the Case

Appellant, the owner of the distribution rights in the United States for the Danish motion picture, "A Stranger Knocks" ("the Film"), arranged for its importation into the United States, and the Film was duly admitted for entry by the United States Bureau of Customs after it had determined that the Film is not obscene (R. 59-63).

In March, 1963, upon appellant's application for a license to exhibit the Film in the State of New York, the director of the Motion Picture Division of the State Education Department (the administrative official of first instance) advised appellant that a license would not issue unless two scenes, claimed to be obscene under section 122 of the State Education Law, were first eliminated (R. 33-34). Appellant thereupon appealed to the State Board of Regents ("the Board"), which, on June 27, 1963, sustained the determination of the Motion Picture Division (R. 76-77).

Both the Division and the Board rested their rulings on that portion of section 122 which authorizes denial of a

license for a film if "a part thereof" is deemed obscene (R. 33-34, 35-37, 76-77). Neither held the Film as a whole obscene; neither articulated the definition of obscenity applied in denying a license (R. 33-34, 76-77).

After the Board's adverse determination, appellant instituted a proceeding in the State Supreme Court seeking judgment annulling that determination and declaring section 122 and related provisions unconstitutional (R. 6-10).

Before the Board and in the State Supreme Court, appellant adduced substantial proof that the Film in fact is a serious work of art dealing with contemporary questions of vital importance (R. 11-25, 63-75). There was evidence that it had received numerous awards for excellence in its native Denmark and in the United States and that critical opinion unanimously regarded it as a work of esthetic and moral stature (R. 11-12, 17-21, 63-74). There was also evidence that it had been exhibited in many cities of the United States without private or governmental objection (Br. App. A18-A22). There was no evidence whatever casting any doubt on the status of the work as a seriously intentioned work of art.

In the State Supreme Court, in addition to the state grounds advanced, appellant contended that the Board's refusal to issue the license was invalid for the following reasons (R. 6-10):

1. Section 122 of the Education Law, on its face and as construed and applied by the Board, violates the First Amendment to the United States Constitution, as incorporated in the Fourteenth, in that it authorizes denial of a license because only part of a film is deemed obscene—a result precluded by the ruling in *Roth* v. *United States* (*Alberts* v. *California*), 354 U. S. 476, that the work must be taken as a whole.

2. Section 122, as applied to authorize denial of a license for the Film, violates the First Amendment, as in-

corporated in the Fourteenth, because neither of the two scenes in question (assuming *arguendo* that they may be considered in isolation) nor the Film as a whole is obscene within the meaning of *Roth-Alberts*.

3. Section 122 and related provisions, which require a license for exhibition of a motion picture and preclude exhibition without a license on pain of criminal penalty, violate the First Amendment, as incorporated in the Fourteenth, in that they constitute an impermissible prior restraint on the free expression of ideas.

4. Section 122, as applied to an imported film previously admitted for entry into the United States by the Bureau of Customs after it has determined that it is not obscene, conflicts with section 305 of the Tariff Act of 1930 and violates Article VI of the United States Constitution.

The Appellate Division of the State Supreme Court, to which the proceeding was referred for disposition, held, one judge dissenting, that *Roth* was controlling; that, measured by the standard in *Roth*, the Film is not obscene; and consequently that a license must issue. The Court said (Appendix B, *infra*, p. 30):

> "The decisions of the Supreme Court in *Times Film Corp* v. *City of Chicago* (355 U. S. 35) and *Roth* v. *United States* (354 U. S. 476) compel us to annul the determination of the Board of Regents. The sexual acts, which are implied rather than demonstrated, are an integral part of the play."

So holding, the Court did not reach appellant's remaining contentions.

On appeal by the Board to the Court of Appeals, appellant again advanced all the Federal contentions previously urged, including those adopted by the Appellate Division. The Court of Appeals, three judges dissenting, reversed the Appellate Division and reinstated the Board's determination which denied a license for the Film (Appendix A, *infra*, p. 15).

The Court of Appeals construed section 122 of the Education Law to authorize denial of a license on the ground that a film was "obscene," within the meaning of that statute, if any single scene of the film portrayed any conduct which, if actually engaged in in public, would violate State statute or public policy. The Court explicitly rejected the standards of obscenity enunciated in this Court's decisions, holding that the portrayal of conduct in the motion picture here involved did not constitute "speech proper" within the meaning of the First Amendment and that therefore it was unnecessary to construe section 122 in accordance with this Court's decisions or to determine whether the Film or any part thereof was obscene within the meaning of those decisions. Although it did not specifically refer to them, the Court rejected appellant's remaining contentions (see Appendix E, *infra*, p. 36).

For some four months—from November 27, 1963, the date of the Appellate Division order annulling and reversing the determination of the Board and directing that a license issue "forthwith" (R. 83-85), until March 26, 1964, when the Court of Appeals, by a four to three vote, reversed the Appellate Division and reinstated the Board's determination—appellant made repeated efforts to obtain a license pending the outcome of the Board's appeal to the Court of Appeals (Br. App. A12-A22). Although the only judicial determination prior to March 26, 1964 was that the Film is not obscene, appellant was, however, precluded from exhibiting the Film in the State. In effect, therefore, even had appellant ultimately prevailed before the Court of Appeals, it would have been prevented from exhibiting the Film for more than a year (from March, 1963, when it applied for the license, until March, 1964, when the Court of Appeals rendered its decision) notwithstanding the favorable intermediate decision by the Appellate Division on the obscenity question.

F. The Federal Questions Involved on This Appeal Are Substantial.

1. As previously indicated, the State Court of Appeals explicitly rejects the standards of obscenity laid down in this Court's decisions. It construes section 122 of the State Education Law to authorize denial of a license on the ground that a film is "obscene", within the meaning of that statute, if any single scene of the film portrays any conduct which, if actually engaged in in public, would violate State statute or public policy. Thus, the State Court in effect adopts a notion of "*per se* obscenity," eliminating all the cogent questions which this Court dictates must be resolved before a work may be branded obscene. It rejects considerations of artistic merit, intellectual content, social importance and other such pertinent factors. It applies a rigid test totally unresponsive to the complex problems inherent in any system which seeks to regulate free expression. And the plain command of this Court that a work be judged as a whole is denied, and exhibition of a film barred solely because two scenes are deemed objectionable.

This Court, however, has made it clear that, whatever the scope of its review in obscenity cases, state legislation designed to prevent the dissemination of obscene material can be justified under the Constitution only if brought within the narrow confines of obscenity as defined in *Roth* v. *United States* (*Alberts* v. *California*), 354 U. S. 476 (1957) and *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962). *Jacobellis* v. *Ohio*, — U. S. —, 32 L. W. 4652. It has further emphasized that obscene material denied First Amendment protection must be narrowly restricted to material "utterly without redeeming social importance." *Ibid.*

The State Court may not avoid the thrust of those controlling decisions by holding the portrayal of conduct in a motion picture not "speech" and thus free itself to

define the word "obscenity" as it desires, without regard to constitutional limitations. Such a rationale not only runs counter to this Court's rulings, it ignores the policy considerations which underlie them.

There can be no question that "[m]otion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press." *Jacobellis* v. *Ohio, supra* (opinion of Brennan and Goldberg, *JJ.*); see, also *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961). The view of the court below thus inevitably results in the most drastic impairment of freedom of expression. A logical extension of its view would read the graphic, *i.e.,* nonverbal, arts—for example, silent motion pictures, sculpture and paintings—quite out of the protection of the First Amendment. For, under that view, if such nonverbal art forms portrayed conduct which, if actually engaged in in public, would violate state statute or public policy, their exhibition could be forbidden without regard to their esthetic, intellectual, political or moral content. Thus, a state could enact a statute requiring that all statues and paintings of nudes, regardless of the intent and content of the particular work, be removed from museum walls.

Such a view, however, obviously cannot be squared with constitutional requirements. On numerous occasions, this Court has made it quite clear that the First Amendment is not limited to verbal expression. As was stated in *Garner* v. *Louisiana,* 368 U. S. 157, 201 (1961) (Harlan, *J.*, concurring):

> "• • • This Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, *Gitlow* v. *New York,* 268 U. S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633-634. See also *N. A. A. C. P.*

> v. *Alabama*, 357 U. S. 449, 460. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California, supra*, the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections. * * * "

If picketing and sitting-in at a lunch counter are protected "speech," a motion picture, which is an ordered and self-conscious expression of ideas, is not less so simply because those ideas are expressed through action rather than words. In any event, as indicated, the question is not an open one. *Jacobellis* v. *Ohio* and *Joseph Burstyn, Inc.* v. *Wilson, supra.*

2. The New York statute, on its face and as here construed and applied, also constitutes an impermissible prior restraint of free expression. *A Quantity of Copies of Books* v. *Kansas*, — U. S. —, 32 L. W. 4658; *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961) and *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); see also *Freedman* v. *Maryland*, — U. S. —, 32 L. W. 3444 (probable jurisdiction noted). The three decisions cited make it clear that a statute which results in substantial impairment of the freedom to disseminate motion pictures or books by prohibiting their exhibition or sale on the ground of obscenity without a prior judicial determination violates the First Amendment, as incorporated in the Fourteenth. Since exhibition of any film without a license in New York is a criminal offense, here too, as in the *Kansas* case, appellant "was not afforded a hearing on the question of the obscenity" before the work was suppressed.

The present case represents an extraordinary example of such an unconstitutional statutory system. Appellant applied for a license to exhibit this motion picture more

than sixteen months ago, yet it is still unable to do so without inviting criminal prosecution. Indeed, the New York licensing system is such that one must exhaust two levels of administrative procedure and three levels of State Court procedure, without any provision for expedition of administrative or judicial determination, even before one can secure a determination by the ultimate State authority. Moreover, even in the event of a favorable decision at any one level—as in this case—a prospective exhibitor remains unable to exhibit the motion picture until the licensing authority has exhausted all available avenues of appeal. Certainly, such a system constitutes an impermissible restraint of freedom of speech.

Times Film Corp. v. *Chicago*, 365 U. S. 43 (1961), is no support for the statute here involved. In *Times Film*, the exhibitor refused to submit the motion picture for licensing, and consequently the concrete effects of the licensing system there were not before the Court. Here, on the other hand, the Court is presented with a record which abundantly demonstrates the substantial deterrent effect of New York's cumbersome and elaborate licensing system. Confronted with the lengthy and costly proceedings necessary to secure the right to exhibit a film (assuming ultimate success on the merits), a distributor or an exhibitor is strongly motivated to cut a film rather than to litigate.

In any event, it may very well be that the Court should reconsider *Times Film*. The exact practical consequences of licensing statutes evidenced by the present record indicate that these systems of pre-exhibition restraint constitute grave impairment of freedom of expression.

Indeed, subsequent to *Times Film*, a number of state courts have struck down pre-exhibition motion picture licensing statutes as impermissible prior restraints. *City of Portland* v. *Welch*, 229 Ore. 308, 367 P. 2d 403 (1961); *K. Gordon Murray Productions, Inc.* v. *Floyd*, 217 Ga. 784, 125 S. E. 2d 207 (1962); *Goldman Theatres, Inc.* v. *Dana*, 405 Pa. 83, 173 A. 2d 59 (1961).

3. Section 305 of the Tariff Act of 1930 prohibits the importation of motion pictures and other works which are obscene. The motion picture here involved was imported from Denmark and granted entry by the United States Bureau of Customs only after it had determined that the Film is not obscene (R. 59-63). The action of the New York authorities prohibiting exhibition of the Film thus conflicts directly with the prior determination of the Federal customs officials.

This Court has frequently struck down State statutes which conflict with Federal regulations. See, *e.g.*, *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956); *Sperry* v. *Florida*, 373 U. S. 379 (1963).

Allen B. Dumont Laboratories v. *Carroll*, 184 F. 2d 153 (3rd Cir. 1950), *cert. den.* 340 U. S. 929, holding that the regulation of television broadcasting by the Federal Communications Commission precludes the application of State obscenity statutes to motion pictures appearing on television, clearly compels the conclusion that the regulation of film importation by the Bureau of Customs similarly precludes state censorship of imported films on the ground of obscenity.

CONCLUSION

This appeal presents substantial Federal questions. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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APPENDIX A

Opinions of the New York Court of Appeals

In the Matter of

TRANS-LUX DISTRIBUTING CORP.,

Respondent,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellant.

Argued January 22, 1964; reargued March 23, 1964; decided March 26, 1964.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 27, 1963 (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County), which annulled, by a divided court, a determination of the Board of Regents of the University of the State of New York refusing to license a motion picture and directed that a license be issued.

CHARLES A. BRIND, JOHN P. JEHU, ELIZABETH M. EASTMAN and GEORGE B. FARRINGTON for appellant. I. The State statute preventing public exhibition of obscene films is constitutional, (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Times Film Corp.* v. *Chicago*, 365 U. S. 43; *People* v. *Fritch*, 13 N Y 2d 119; *Roth* v. *United States*, 354 U. S. 476.) II. The film in question is obscene within the meaning of the statute and not entitled to licensure. III. There is no conflict between the New York State statute and the Federal Tariff Act. (*Allen B. Dumont Labs.* v. *Carroll*, 184

F. 2d 153; *Head* v. *New Mexico Bd.*, 374 U. S. 424; *Maurer* v. *Hamilton*, 309 U. S. 598; *Weigle* v. *Curtice Bros. Co.*, 248 U. S. 285; *Carey* v. *South Dakota*, 250 U. S. 118.)

HARRY I. RAND, WARREN F. SCHWARTZ and LEONARD H. DICKSTEIN for respondent. I. The board's determination refusing to issue a license for exhibition of the film is invalid because it did not consider the film as a whole but rather was based solely on the finding that two parts of the film are obscene. (*Roth* v. *United States*, 354 U. S. 476; *Manual Enterprises* v. *Day*, 370 U. S. 478; *People* v. *Richmond County News*, 9 N Y 2d 578; *People* v. *Fritch*, 13 N Y 2d 119; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *Commonwealth* v. *Moniz*, 338 Mass. 435; *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334; *Excelsior Pictures Corp.* v. *City of Chicago*, 182 F. Supp. 400; *Goldman Theatres* v. *Dana*, 405 Pa. 83.) II. In any event, the judgment of the Appellate Division annulling the determination of the board and directing the issuance of a license for the film must be affirmed because neither the film nor any portion thereof is obscene. (*Matter of Excelsior Pictures Corp.* v. *Regents of Univ. of State of N. Y.*, 3 N Y 2d 237.) III. Section 122 of the Education Law and related provisions requiring the issuance of a license for exhibition of a film and imposing criminal sanctions for exhibition without a license constitute an impermissible prior restraint in violation of sections 6 and 8 of article I of the State Constitution and the Fourteenth Amendment to the Federal Constitution. (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684; *Sunshine Book Co.* v. *McCaffrey*, 4 A D 2d 643; *Zenith Int. Film Corp.* v. *City of Chicago*, 291 F. 2d 785; *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436; *City of Portland* v. *Welsh*, 229 Ore. 308; *Gordon Murray Prods.* v. *Floyd*, 217 Ga. 784; *Goldman Theatres* v. *Dana*, 405 Pa. 83.) IV. The board's determination is invalid because the application of the Edu-

cation Law to the film is barred by section 305 of the Tariff Act of 1930, which pre-empts the field with respect to films imported into the United States. (*Allen B. Dumont Labs.* v. *Carroll*, 184 F. 2d 153; *Pennsylvania* v. *Nelson*, 350 U. S. 497; *Hines* v. *Davidowitz*, 312 U. S. 52.)

BURKE, *J.* This appeal puts in issue once again the constitutionality of an application of this State's motion picture licensing statute (Education Law, § 122). The Appellate Division has annulled a determination of the Board of Regents which directed the elimination of two scenes from the film "A Stranger Knocks" as a condition for granting a license for the exhibition of the film. The grounds for the board's action rested on the alleged obscenity of two sequences in the picture. The first scene presents a man and a woman on a beach embracing and caressing one another, and ends in a view of the head and shoulders of the woman with facial expressions indicative of orgasmic reaction. The second scene presents the woman astride the man on a bed. Their bodily movements are unmistakably those of the sexual act and the woman's face again registers emotions concededly indicative of orgasm. This scene is the dramatic climax of the picture because of the coincidence of the woman's passion with her sudden realization, through the exposure of a tell-tale scar, that the man is her deceased husband's murderer. As respondent's affidavit puts it: "The climax is a groan of pleasure and pain, a dramatic and eloquent expression of the persistent ambivalence in the relationship".

This case presents the question of film obscenity in a form quite different from the two decisions of this court that were reversed by the Supreme Court. In both *Commercial Pictures Corp.* v. *Regents* (346 U. S. 587, advocacy of adultery) and *Joseph Burstyn, Inc.*, v. *Wilson* (343 U. S. 495, sacrilege) the issue was so-called thematic obscenity, that is, advocacy of a theme that was forbidden. Here, how-

ever, the ground taken by the State is obscenity in filmed behavior, not in anything advocated as an idea or program. We are, therefore, required to examine the applicability of the First Amendment to this film in light of the classic distinction between advocating something presently against the law and actually doing it.

The first thing that ought to be restated is the rather obvious fact that the law does not cope with obscenity in the abstract. It is met only as an alleged characteristic of something else, something concrete, some speech, action or thing. Accordingly, it must not be forgotten that offensiveness and obscenity enjoy no preferred position in the law merely because of their being offensive. That would be nonsense. It is the thing alleged to be obscene that the Constitution is concerned with—and that only when the thing is speech, broadly conceived as communication. For example, the sale or display of some *object* condemned as obscene might present a question of statutory construction, rarely a First Amendment problem. Similarly, an offensive sight is on its face no more legally immune under the First Amendment than, for example, an offensive odor. This need not even approach the obscene. Zoning regulations controlling the appearance of buildings and the like are routinely enforced (e.g., *Berman* v. *Parker*, 348 U. S. 26; *People* v. *Stover*, 12 N Y 2d 462).

While typically applicable to "speech" and "press" in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (*Thornhill* v. *Alabama*, 310 U. S. 88; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, *supra*). cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see, e.g., *Thornhill* v. *Alabama*, 310

U. S. 88, *supra*) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (*Plumbers Union* v. *Graham*, 345 U. S. 192). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (*Giboney* v. *Empire Stor. Co.*, 336 U. S. 490). For example, in *People* v. *Stover* (12 N Y 2d 462, *supra*, app. dsmd. for want of a substantial Federal question 375 U. S. 42) this court upheld an "Aesthetic" ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if "picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation" (*Giboney* v. *Empire Stor. Co. supra*, p. 501) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene *behavior* on the screen. In such a case, the First Amendment must be applied to films according to their special nature, just as it has been applied to conduct. This much has, of course, been explicitly recognized in the leading case on films and the First Amendment: "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." (*Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 503, *supra*.)

Appendix A—Opinions of the New York Court of Appeals

In *Kingsley Pictures Corp.* v. *Regents* (360 U. S. 684) the opinion of the court repeatedly distinguishes between the right to communicate any idea, however deviant from orthodoxy, and "the manner of its portrayal" (p. 688). The "freedom to advocate ideas" was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice CLARK who wrote: "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'. If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than what it depicts. There is where the confusion enters" (p. 702; emphasis in original).

It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibition as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice DOUGLAS acknowledged, dissenting in *Roth* v. *United States* (354 U. S. 476, 512), in contrasting books with conduct: "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct" (emphasis in text).

This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theatres for money (e.g., Penal Law, §§ 43, 1140, 1140-a, 1140-b). There have been many cases dealing

with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretation, never, obviously, the First Amendment. (*Miller* v. *People*, 5 Barb. 203; *People* v. *Burke*, 243 App. Div. 83, affd. 267 N. Y. 571; *People* v. *Mitchell*, 296 N. Y. 672; *People* v. *Dash*, 282 N. Y. 632.)

This comparison between the acknowledged competence of the State to forbid public or semipublic sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done if shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

The pattern of statutory regulation in New York aims at offensive—more properly, obscene—*displays of conduct* whether in the street (Penal Law, §§ 43, 1140, 1140-b), on the stage (Penal Law, § 1140-a; *People* v. *Vickers*, 259 App. Div. 841—lewd dance) or on the screen (Penal Law, §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see *Stromberg* v. *California*, 283 U. S. 359); they are aimed at certain narrow sorts of

conduct. It seems to me, therefore, that if the defendants in *People* v. *Stover* (*supra*) could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, *People* v. *Vickers*, *supra*, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the "nude gymnasium" prohibited by Penal Law, § 1140-b). Numerous other instances also suggest themselves.

If we can accept the obvious—that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest *), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has "brigaded" the communication (to the extent that it is "communication") with conduct completely. In so doing the petitioner has subjected itself to such regula-

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* The police or general powers of government extend to "the preservation of good order and the public morals." (*Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33.) As Mr. Justice HARLAN recently stated the State's authority to legislate in support of moral standards: "Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from such community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. Compare *McGowan* v. *Maryland*, 366 U. S. 420." (HARLAN, J., dissenting in *Poe* v. *Ullman*, 367 U. S. 497, 545-546.)

tions as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare *Thornhill* v. *Alabama*, 310 U. S. 88, with *Plumbers Union* v. *Graham*, 345 U. S. 192.) "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it" (DOUGLAS, J., dissenting in *Roth* v. *United States*, 354 U. S. 476, 514).

Just what regulations are appropriate regarding displays of sexual intimacy in public or semipublic places may be a matter for debate. The debate is most profitably conducted, however, in the malleable forum of public policy rather than within the rigidities of constitutional law. In regard to conduct which has been legislatively declared to be against public policy, we are reminded by Mr. Justice HOLMES that "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect" (dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, 344). The sole exception to this tolerance of experimentation is legislation hostile to that freedom of expression necessary to the healthy functioning of an open democratic society. It is after careful consideration that I conclude that, far from hostility to any idea, even hateful ideas that undermine social morality, section 122 of the Education Law merely proscribes certain behavior, which, when viewed by the public, is deemed offensive and destructive of moral standards historically protected by the State and which "bears no necessary relationship to the freedom to speak, write, print or distribute informa-

tion or opinion" (*Schneider* v. *State*, 309 U. S. 147, 161).

The scenes referred to by the State are obscene within the meaning of section 122 of the Education Law as I understand it in light of the Fourteenth Amendment. The issue of obscenity as a constitutional standard applicable to speech proper, or whether the conduct here depicted can even be meaningfully thought of as speech in this context, need not be decided.

Lastly, because the material assigned as obscene in this case is not, in my view, speech, as opposed to conduct, it need not come within the test laid down in *Roth* v. *United States* (354 U. S. 476, *supra*), that, in speech cases, obscenity must be the dominant theme of the work as a whole. If that requirement were applicable to cases of this nature, the law would be helpless to cope with the grossest imaginable pornography if it were included in a film as an incidental feature, collateral to the main plot, just as a profitable bit of sensationalism. If we admit of the concept of obscenity as a public evil at all, it must be recognized that the full force of such an evil could flourish in nonthematic interludes of motion pictures. If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition. The licensing statute contemplates the deletion of such material. It may either be omitted entirely or the producer may redo the scene another way. If it is objected that the enterprise is artistically not worth doing without the scene as it stands, that is the problem, not of the law, but of the producer who has made a pornographic scene so central to his work.

To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other pro-

fession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films.

The order appealed from should be reversed and the determination of the Board of Regents reinstated, with costs in this court and in the Appellate Division.

Chief Judge DESMOND (concurring). As the Appellate Division dissenting opinion emphasizes, two scenes in this movie "forthrightly depict the fulfillment of acts of sexual intercourse between the principal characters." This order if affirmed would be (as I am persuaded after some research) the first court determination in recorded history holding to be nonobscene and constitutionally protected the portrayal on stage or a screen of the very sexual act itself. An affirmance would license the inclusion, in a stage play or a movie (or on television?) of actual scenes of intercourse and of other kinds of behavior always and everywhere considered to constitute indecency when carried on in public. The question presented on this appeal is, therefore, a new one not controlled by any earlier censorship decisions.

Lest we get too far away from the actual question, let us remind ourselves that the Regents did not refuse to license this picture but went no further than to direct the elimination therefrom of the two scenes of sexual congress. If we were to hold that this Regents' determination was illegal we would be saying that there is a constitutional right to include in a motion picture a direct acting out of coitus. Therefore, what is involved here is not the description in a book of sexual acts but the actual performance of those acts in public. To fornicate in public or to exhibit the sexual organs in public has been considered obscene conduct at least since 1663 in the case of *King* v. *Sedley* (1 Keble 620), wherein Sir Charles Sedley was convicted of obscenity because, standing on a London balcony, he exhibited himself in the nude to the populace. The ban on

such exhibitions is probably as old as human society and it has never disappeared from our law.

When the Supreme Court held in *Times Film Corp.* v. *Chicago* (365 U. S. 43), that pre-exhibition administrative censorship of motion pictures was not necessarily unconstitutional, it was saying that there are still some kinds of movie portrayals that the State's police power may forbid. Inapplicable to an act of public indecency are the tests used for determining obscenity of a book, that is, predominant appeal to prurient interest, going substantially beyond customary limits of candor and contemporary community standards, patent offensiveness and the necessity of taking the material as a whole and not condemning it by reason of isolated passages. It is unthinkable that a civilized community would permit actors to simulate sexual acts in a play or movie just because the play or movie is said by some critic or other to be an artistic work. Lewd conduct in public whether on the sidewalk, the stage, or the screen has always been forbidden and controllable by police power statutes (see *Commonwealth* v. *Lambert*, 94 Mass. 177, and Penal Law, art. 106). If that is not so there can be presented on Broadway under protection of the law a well-written, well-acted play about a prostitute including incidents where she is actually working at her trade and the defensive argument would be that these incidents were relevant and indeed essential to the development of a dramatic theme.

Respondent leans on an old and well-worn crutch when it argues that the film must be licensed since it is a "serious dramatic work" and an "artistic" piece of work, etc., etc. Such is a matter of critical choice, even though to some of us "A Stranger Knocks" looked like a mediocre movie, in no way notable except for the uniqueness of its departures from common decency. But, artistic or not, it contains in the two interdicted sequences, a cold, brazen affront to the accepted public moral code at its lowest possible level. All

societal organizations, even civilization itself, depend for permanence on the fixing of a minimal standard of conduct permissible in public. Judges do not have to qualify as dramatic critics before concluding that the loss to society from the cutting of these scenes of fornication is of very little consequence as weighed against the loss to public decency from their exhibition.

Summing it up, we have here the bald question of whether the State of New York has power to require that this movie be not shown unless there are deleted therefrom the two scenes which "forthrightly depict" sexual intercourse.

I vote to reverse.

SCILEPPI, J. (concurring). I concur for reversal. The facts are not in dispute. The film is in evidence as an exhibit and was viewed by the court. There are two scenes in this motion picture which admittedly were intended to depict sexual intercourse. The claim, however, is that said acts were implied rather than demonstrated, and, further, that the picture has constitutional protection, not only because of its redeeming artistic value but also because the dominant theme of the film taken as a whole is not obscene.

As I viewed the film, there is nothing implied—rather, the two principal characters, unmistakably and realistically portray two persons having sexual intercourse, including the final stage—a climactic orgasm. Moreover, the dominant theme test is, I believe, inapplicable to motion pictures. The two offending scenes must be judged separately as would still photographs.

I would conclude that the graphic portrayal in a motion picture of sexual intercourse, illicit or otherwise, simulated or real, is obscene under any of the established legal standards (see, e.g., *Manual Enterprises* v. *Day*, 370 U. S. 478; *Roth* v. *United States*, 354 U. S. 476; *People* v. *Richmond County News*, 9 N Y 2d 578). That these scenes may have

been artistically inspired is without significance. Whether matter is to be judged obscene requires the application of objective standards by the courts and not an expedition into subjective motivations (see *People* v. *Fritch*, 13 N Y 2d 119). I am unwilling to contribute to the writing of "Finis" to the moral code of the vast majority of the people in our country by placing a stamp of approval on exhibitions of this nature.

WILLIAMS, *J.* (concurring). The fundamental question is whether the State Board of Regents had the power to direct the deletion of the portrayal of two acts of sexual intercourse as "obscene". One argument that has been advanced by those who would display such scenes to the general public is that the censorial elimination would destroy a cultural and important social theme. If, in fact, the theme presents serious questions of social and moral problems, on a high cultural level (which I do not admit), that theme and those questions can as well be preserved by the substitution of other and less offensive types of portrayal. The acts need not actually be visibly depicted to impart to the public that the acts of intercourse had indeed taken place.

It is contended that the production must be considered as a whole, but to my mind its over-all merit is not such as to support scenes of obscenity. And the contention that the two scenes of visible sexual intercourse are necessary to maintain the high cultural level of the picture speaks little for the social value of the production "as a whole".

However, to revert to the original basic problem, I do not favor the actual physical portrayal of acts of sexual intercourse in public whether it be through the media of motion pictures the theatre or otherwise. In my opinion the Board of Regents was amply justified in finding the eliminated scenes to be obscene and had complete authority to direct their deletion.

Opinion by Judge BURKE in which Chief Judge DESMOND and Judges SCILEPPI and WILLIAMS* concur, each in a separate opinion in each of which the others concur; Judges DYE, FULD and VAN VOORHIS dissent and vote to affirm upon the majority memorandum opinion in the Appellate Division.

Order reversed, etc.

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* Designated pursuant to article VI (§ 2, subd. a) of the State Constitution in place of Judge BERGAN, disqualified.

APPENDIX B

Supreme Court, Appellate Division, Opinion and Dissenting Opinion

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

November 21, 1963
6183

In the Matter of the Application

of

TRANS-LUX DISTRIBUTING CORP.,

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

The decisions of the Supreme Court in *Times Film Corp.* v. *City of Chicago* (355 U. S. 35) and *Roth* v. *United States* (354 U.S. 476) compel us to annul the determination of the Board of Regents. The sexual acts, which are implied rather than demonstrated, are an integral part of the play.

Determination annulled and matter remitted with a direction to license the film; with $50. costs.

Bergan, P. J., Gibson, Reynolds and Taylor, JJ., concur.

Herlihy, *J.*, dissents, in a memorandum.

Herlihy, *J.*, dissents. I would affirm the order of the Board of Regents which deleted certain designated scenes from the motion picture. The portrayals therein go substantially beyond the accepted customary limits. They forthrightly depict the fulfillment of acts of sexual intercourse between the principal characters. Thus these delineations are *sui generis* rendering the usual test of obscenity impossible to apply with any reasonableness.

APPENDIX C

Decision of the Board of Regents of the University of the State of New York

THE UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of the

Appeal from the action of the DIRECTOR OF THE DIVISION OF MOTION PICTURES in refusing to grant a license for a motion picture film entitled: "A STRANGER KNOCKS".

WEISMAN, CELLER, ALLAN, SPETT & SHEINBERG, Esqs., Attorneys for Petitioner.

This is an appeal by the Trans-Lux Distributing Corp. from the refusal of the Director of the Motion Picture Division to license a motion picture entitled "A STRANGER KNOCKS" on the ground that certain views were obscene and consequently would need to be deleted in order that the picture may be licensed.

We have examined the picture and have listened to argument, and have carefully reviewed the record before us. There were two scenes, one in Reel 3D and the other in Reel 4D, involving sexual intercourse which in our view are obscene within the meaning and intent of Sections 122 and 122-A of the Education Law. We concur with the determination of the Director of the Motion Picture Division that this motion picture may not be legally licensed without the deletion of these scenes as ordered by him.

The Appeal is Dismissed.

Appendix C—Decision of the Board of Regents of the University of the State of New York

IN WITNESS WHEREOF, we, a duly constituted Committee of the Board of Regents, appointed pursuant to the provisions of Section 124 of the Education Law of the State of New York, do hereunto set our hands and affix the seal of the University of the State of New York, at the City of Albany, this 27th day of June 1963.

/s/ GEORGE L. HUBBELL, JR.,

/s/ EVERETT J. PENNY,

/s/ JOSEPH T. KING,
Committee of the Board of Regents.

(Seal)

APPENDIX D

Order of the New York Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-sixth day of March A. D. 1964.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

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3 No. 20

In the Matter of

the Application of TRANS-LUX DISTRIBUTING CORP.,
Respondent,

for an order &c.

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appeliant.

This cause having been argued by Charles A. Brind, Esq., of counsel for the appellant, and by Harry I. Rand, Esq., of counsel for the respondent, and due deliberation having been thereupon had, it is

Appendix D—Order of the New York Court of Appeals

ORDERED AND ADJUDGED that the order of the Appellate Division appealed from be and the same hereby is reversed and the determination of the Board of Regents reinstated, with costs in this Court and in the Appellate Division. Opinion by Burke, J., in which Desmond, Ch. J., Scileppi and Williams, JJ., concur, each in a separate opinion in each of which the others concur. Dye, Fuld and Van Voorhis, JJ., dissent and vote to affirm upon the majority memorandum opinion in the Appellate Division.

A copy

RAYMOND J. CANNON
Clerk

(SEAL)

APPENDIX E

Order of the New York Court of Appeals Amending the Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirtieth day of April A. D. 1964.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding,

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3 Mo. No. 387

In the Matter of

the Application of TRANS-LUX DISTRIBUTING CORP.,
Respondent,

for an order &c.

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix E—Order of the New York Court of Appeals Amending the Remittitur

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon certain questions under the Constitution and laws of the United States, viz.: Respondent contended that the licensing provisions of Education Law, § 122 violate the Fourteenth Amendment to the United States Constitution; that the film here involved could not be denied a license under § 122 without violating the Fourteenth Amendment; and that § 122 violates § 305 of the Tariff Act of 1930. The Court of Appeals held that there were no such violations of federal law for the reasons stated in the opinion of the Court and in the concurring opinions.

AND the Supreme Court of Albany County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

APPENDIX F

Final Order and Judgment of the Supreme Court, Albany County

At a term of the Supreme Court in the State of New York held in and for the County of Albany at the County Court House in the City of Albany, State of New York, on the 24th day of April 1964.

Present:

HON. SIDNEY F. FOSTER,
Justice.

SUPREME COURT
ALBANY COUNTY
Index No. 4512/63

In the Matter of the Application of

TRANS-LUX DISTRIBUTING CORP.,
Petitioner-Respondent,

for an order pursuant to Article 78 of the Civil Practice Act,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent-Appellant.

An application having been made by Trans-Lux Distributing Corp., the petitioner in this proceeding, to the Supreme Court of Albany County in the State of New York, to review a determination of the respondent refusing a license for the exhibition of the film "A Stranger Knocks" in the State of New York, after a hearing held by said respondent at which evidence was taken, and said proceeding having been duly transferred by an order of

the Supreme Court to the Appellate Division of the State of New York, Third Judicial Department, for disposition, and by order entered on the 27th day of November 1963, the said Appellate Division having annulled the determination of the Board of Regents in refusing said license, and an appeal having been taken to the Court of Appeals of the State of New York from the said order and judgment of the said Appellate Division, Third Department, and the said appeal having duly come on for argument and reargument before the Court of Appeals and the said Court having heard Charles A. Brind, for respondent-appellant Board of Regents of the State of New York and Weisman, Celler, Allen, Spett & Sheinberg (Harry I. Rand, of counsel), for the petitioner-respondent Trans-Lux Distributing Corp. and due deliberation having been had thereon and said Court having rendered its decision that the order of the Appellate Division of the Supreme Court, appealed from, be reversed and the determination of the Board of Regents reinstated with costs in the Court of Appeals and in the Appellate Division and having further ordered that the records and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law,

Now, on motion of Charles A. Brind, attorney for respondent-appellant,

IT IS ORDERED and adjudged that the order and judgment of the Court of Appeals in the above entitled matter be and the same hereby is made the order and judgment of this Court and that the order and judgment of the Appellate Division, appealed from as aforesaid, be and is hereby reversed and the determination of the Board of Regents is reinstated with costs.

Dated April 24, 1964.

s/ SIDNEY F. FOSTER,
Justice, Supreme Court

APPENDIX G

Statutes

EDUCATION LAW, ARTICLE 3, PART II

McKINNEY'S NEW YORK LAWS, 1953.

"PART II—MOTION PICTURE DIVISION

"§ 120. Motion picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

"§ 121. Local offices and bureaus.

The regents may authorize the establishment and maintenance of offices and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

"§ 122. (Set forth in text supra, page 3).

"§ 122-a. Definitions.

"1. For the purpose of section one hundred twenty-two of this chapter, the term "immoral" and the phrase "of such a character that its exhibition would tend to corrupt morals" shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

"2. For the purpose of section one hundred twenty-two of this chapter, the term "incite to crime" shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs."

"§ 123. Permits

"1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

"2. Scientific and educational films. Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall in-

clude a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

"3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

"§ 124. Review by regents

"An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

"§ 125. Permits revocable

"Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any

such film may be submitted to such director or authorized officer only in the manner provided for license.

"§ 126. Fees

"The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a) for each original film; a fee of three dollars and fifty cents for each one thousand feet or fraction thereof and b) for each copy of an original film for which a license or permit has been issued, a fee of three dollars for the entire copy and in addition one dollar for each one thousand feet or fraction thereof. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

"§ 127. Applications

"No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

"§ 128. Licenses and permits void

"Any license or permit issued upon a false or misleading affidavit or application shall be wholly void ab initio.

Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall per se revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

"§ 129. Unlawful use or exhibition

"It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the State of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

"This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

"§ 130. Posters, banners, et cetera

"No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a charac-

ter that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

"§ 131. Penalty

"A violation of any provision of part two of this article shall be a misdemeanor.

"§ 132. Enforcement; rules and regulations

"The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the State of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations."

SECTION 305 OF THE TARIFF ACT OF 1930, 46 STAT. 688, 19 U. S. C. SECTION 1305.

"§ 1305. Immoral articles, importation prohibited—Prohibition of importation

"(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular,

print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *Provided,* that the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: *Provided further,* that the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and

destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 314

TRANS-LUX DISTRIBUTING CORP.,
Appellants,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Appellees.

MOTION TO DISMISS APPEAL

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

The facts are that petitioner applied to the Motion Picture Division of the State Education Department for a license to exhibit the said film in the State of New York.

The Motion Picture Division, after reviewing the film, directed the elimination of two scenes which depicted sexual intercourse. Subsequently, on request of the petitioner, the film was again reviewed by the Director of the Motion Picture Division who sustained the recommendation of the Reviewing Committee. The petitioner then appealed to the Board of Regents from the decision of the Motion Picture Division to deny a license unless the eliminations recommended were made. The Committee of the Board of Regents reviewed the film under the procedures set forth in Section 124 of the Education Law and dismissed the appeal. The appellant brought a proceeding in the State Courts to review this decision. The Appellate Division of the Supreme Court of the State of New York reversed the determination of the Board of Regents and the Court of Appeals reversed the Appellate Division and reinstated the decision of the Board of Regents.

The film depicts a love affair between a young widow and a stranger who "knocks at her door". In the course of the film, as above indicated, sexual intercourse is shown. An act of sexual intercourse is the climax of the film. For this reason, the film is obscene within the meaning of Sections 122 and 122-A of the Education Law.

Argument

The appeal herein does not present a substantial federal question.

As indicated in the stated facts above, the only issue involved is whether the State of New York violates any State or Federal Constitutional provision or other statute, in refusing to license a motion picture on the sole ground that the picture portrays two acts of sexual intercourse. In all of the cases this Court has indicated that this crass type of obscenity is legally objectionable and that there is nothing in the State or Federal Constitutions which prevent a state in refusing to license a motion picture which portrays pornography. It is to be noted that there is no question but that sexual intercourse is portrayed. The Regents and all the State Courts have indicated this to be the fact. This Court in its decisions has continuously pointed out that the depiction of any scene in a movie which appeal to "prurient interest" is not protected by the constitutional provisions. In this picture not only is sexual intercourse portrayed but the orgasm of the girl is dramatized as the climax to the picture. Hence, in summarizing the above, this Court has already construed the constitutional provisions in respect to the presentation of sexual intercourse, and this leaves no substantial federal question to be determined by the Court. The cases we have reference to are those already quite familiar to this Court, *viz.* (*Burstyn* v. *Wilson*, 343 U. S. 495; *Roth* v. *U. S.*, 354 U. S. 476; *Kingsley Pictures* v. *Regents*, 360 U. S. 684; *Times Film Corp.* v. *Chicago*, 365 U. S. 43).

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MOTION TO DISMISS APPEAL

Appellee in the above entitled case moves to dismiss the appeal on the grounds that the appeal does not present a substantial federal question.

Statement of Facts

This is an appeal from a decision of the Court of Appeals of the State of New York which reversed a decision of the Appellate Division, Third Department, and reinstated the determination of the Board of Regents denying a license to the film "A Stranger Knocks" on the ground the said film is obscene in that it presents scenes of sexual intercourse.

Conclusion

For all the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

Respectfully submitted,

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THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL

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In the one-page argument of its motion to dismiss this appeal, appellee wholly ignores the substantial Federal questions presented in the jurisdictional statement and those underlying the holding of the intermediate appellate court and the opinion of the three-judge minority dissenting in the Court of Appeals. Not only does appellee's motion fail to come to grips with any of these issues, it also completely misstates the holdings of the majority of the Court of Appeals from which this appeal is taken and of the decisions of this Court to which appellee refers.

The motion to dismiss is apparently based on the contention, first, that the State Court of Appeals held the film "obscene" within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957) and, second, that its holding in this respect is so free of doubt that no substantial Federal question is presented. Both premises of appellee's argument are false.

First, as the jurisdictional statement demonstrates, the State Court of Appeals, construing the governing licensing statute of the State, expressly rejected the standards of obscenity articulated in *Roth* v. *United States, supra,* and the other decisions of this Court which followed *Roth.* The Court of Appeals held that denial of a license for exhibition of the motion picture here involved ("the Film") was warranted without regard to whether it was "obscene" under the governing decisions of this Court, stating, as follows:

> "* * * [B]ecause the material assigned as obscene in this case is not, in my view, speech, as opposed to conduct it need not come within the test laid down in *Roth* v. *United States* (354 U. S. 476, *supra*), that, in speech cases, obscenity must be the dominant theme of the work as a whole * * *." (Juris. Statement, Appendix A, p. 24).

Thus, contrary to appellee's contention, the New York Court of Appeals did not hold that the Film was obscene. On the other hand, the majority in the intermediate appellate court and the minority in the Court of Appeals, both regarding *Roth* as controlling, held that the Film was *not* "obscene" under those standards.

The second premise of appellee's motion is likewise false. Even had the State Court of Appeals construed the New York statute as embodying a standard synonymous with the *Roth* standard and held the film "obscene" under *Roth,* a substantial Federal question would plainly be presented. The intermediate appellate court and the three judges dissenting in the Court of Appeals concluded that the Film was not "obscene" under the *Roth* standard, and the cases cited in the jurisdictional statement, nowhere discussed nor distinguished in the motion to dismiss, fully support that conclusion. None of the cases cited by appellee suggests the contrary.

There is no basis at all for appellee to urge that the decisions of this Court, which consistently stress the neces-

sity of viewing a work as a whole and of limiting the application of obscenity laws to works "utterly without redeeming social importance," authorize the denial of a license to the Film solely because two scenes, viewed in isolation, are regarded as "obscene" (and even so holding by application of a standard far different from those articulated by this Court). Furthermore, as already indicated, the Court of Appeals itself did not attempt to justify the result on the ground that the Film was "obscene" under the standards of the cases decided by this Court.

Appellee repeatedly urges that the film portrays actual sexual intercourse and that solely by reason of this fact the film must be held "obscene". While there is no support for such a view of the governing law the fact is, as the intermediate appellate court held: "The sexual acts are implied rather than demonstrated" (Juris. Statement, Appendix B, p. 30).

Appellee's brief is also misleading in arguing that this film is a work designed to appeal to the "prurient" interest by sensationally portraying sexual intercourse. Rather than representing the exercise in "pornography" claimed by appellee, this film is a sensitive and thoughtful treatment of a relationship between a man and woman who are beset by problems of individual responsibility and morality which play a central role in contemporary thought. The film explores these problems in the context of this relationship and the interreaction of the two characters with each other.

Therefore appellee's argument that this film is so clearly "pornographic" as to preclude review by this Court is completely contradicted by the nature of the work itself as a serious treatment of problems of vital contemporary significance.

Beyond this, as the jurisdictional statement shows, the New York licensing statute, on its face and as here con-

strued and applied, constitutes an impermissible prior restraint of free expression, and application of the State statute is precluded here, as to an imported film, by section 305 of the Tariff Act of 1930, which prohibits the importation of "obscene" motion pictures.

This appeal presents substantial Federal questions. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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